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“LOVE DON’T LIVE HERE ANYMORE”: ECONOMIC INCENTIVES FOR A MORE EQUITABLE MODEL OF URBAN REDEVELOPMENT

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“LOVE DON’T LIVE HERE ANYMORE”: ECONOMIC INCENTIVES FOR A MORE EQUITABLE MODEL OF URBAN REDEVELOPMENT

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INTRODUCTION

Her story is all too common in contemporary urban life. For fifteen years, Sue Ann, a working-class mother, lived with her two children in a small two-bedroom apartment in a mixed-use neighborhood in a large urban center. In the past five years, her neighborhood underwent dramatic change as eager developers and trendy young professionals flooded into the neighborhood. Their arrival was accompanied by internet cafes, coffee shops, and bookstores. To accommodate their upper-class demands, residential apartment buildings were gutted and transformed into new condos and lofts.

After watching these transformations take place around her, Sue Ann is notified one day that the developers have set their sights on her apartment building. Sue Ann’s landlord informed the building’s residents of her decision to sell the complex. Sue Ann must now find a new home for herself and her children. However, she has been priced out of her neighborhood, given the reality that the lowest rent in this “revitalized” community is seventy five percent greater than her current rent. The closest affordable housing is in a remote area of town, which will increase her commute to work by forty-five minutes. Furthermore, the school system in the remote area leaves a lot to be desired.

This story of displacement is so recurring that it is fast becoming one of the formative experiences of America’s urban populations. There are increasing numbers of families in urban centers who are finding themselves physically excluded and economically marginalized from

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1 Sue Ann is a fictional character used here to illustrate the plight and experiences of millions of individuals.


4 See Mindy Thompson Fullilove, M.D., ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT. (Random House 1994).

their long-time residences and communities as a result of urban renewal. Urban renewal refers to the process by which municipalities, in conjunction with developers, target sections of a city regarded as low-income, barren and/or blighted and redevelop those areas in order to (among many reasons) increase property values and attract higher-income individuals to the city. Among the problems caused by the displacement of low-income individuals is the psychological strain it has on those who are emotionally attached and economically dependent on their homes and communities.

While the definition of urban renewal changed during the late twentieth and early twenty-first century, the effects of urban renewal have been the same for poor people living in the targeted neighborhoods because their interests and voices continue to be excluded from urban planning programs and development initiatives. In this Article, the Author considers

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6 See Kelo v. City of New London, 545 U.S. 469, 522 (Thomas, J., dissenting) (noting that mid-century development plans employed the Court’s expansive understanding of public use to displace significant numbers of nonwhite families.)


8 The City of New London represents a perfect example of the type of conditions that usually give rise to the implementation of urban renewal projects. According to the court in Kelo, “decades of economic decline led a state agency in 1990 to designate the City [of New London] a ‘distressed municipality.’ [. . .] In 1998, the City’s unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920. These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization.” See Kelo, 545 U.S. at 483.

9 MINDY THOMPSON FULLILOVE, M.D., supra note 4.

10 See Eric L. Silkwood 109 WVLR 521-522, 493 stating “Indeed, urban renewal, which over its sketchy past has displaced scores of African-Americans, came to be called ”Negro removal” . . . instead of urban renewal. Further, scholars have noted how governments have ‘implemented policies to segregate and maintain the isolation of the poor, minority, and otherwise outcast populations,’ . . . “

11 See Sheila R. Foster, The City as an Ecological Space: Social Capital and Urban land Use, December 2006, 546-548, 82 NTDLR 527, stating: “In theory, land use decisions take place within a planning framework, done in accordance with a comprehensive plan. In practice, however, private market forces are more apt to directly influence land use decisions than any comprehensive public deliberative process that considers the larger social, economic, or environmental considerations that underlie land use within an urban area. Although there is some move toward stronger local planning requirements, the prevailing law and practice remains a highly atomized approach . . . The atomization of urban space has fragmented urban communities in ways that make ”bridging” social capital difficult, undermining the formation of socially and economically integrated urban communities. This has had the consequence of isolating certain populations in ways that render them vulnerable to larger structural forces that are difficult for them to overcome without either stronger social and economic resources or collective action on the part of interests who have very little incentive to assist socially isolated communities.” Also see, See Mindy Thompson Fullilove, M.D., ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT. RANDOM HOUSE, 20, 242, 1994 describing urban renewal projects in the 1960’s and 1970’s: “urban renewal [was] , a program of the federal government that provided money for the city to clear ‘blight’. . . by my estimate 16, 000 black neighborhoods were demolished by urban renewal. This massive destruction caused root shock on two levels. First, residents of each neighborhood experience the loss of their life world . . . Root shock post urban renewal, disabled powerful mechanisms of community functioning, leaving the black world at an enormous disadvantage for meeting the challenges of globalization”. Dr. Fullilove explains the reasons underlying her mathematical estimate: . . . “This estimate is based on the
these persistent effects as they have impacted both property owners and lessees. Primarily, this Article concentrates on how the limitations that the Takings Clause imposes on the scope of public purpose, as it is used in eminent domain standards, may be expanded in order to implement more equitable renewal plans. The Author argues that equity-based redevelopment plans can help prevent the displacement, and future exclusion, of traditionally disadvantaged residents of the low-income communities which are normally targeted by redevelopment plans. The Author suggests that a system of incentives that merges the interests of development planners with the interests of the urban poor be incorporated into all urban renewal plans so as to achieve more equitable results. In this way, she attempts to show that the interests of poor individuals can converge with those of city officials and developers. Derrick Bell’s Interest Convergence Theory inspires this incentive-based urban renewal plan. More specifically, This Article will show that the interests of poor individuals can converge with those of city officials and developers. It will explore the intersection of Interest Maximization and Interest Convergence Theory and offer a modified definition of “public purpose” that precludes the exclusion of economically disadvantaged individuals.

Part One of the Article, discusses conventional notions of public purpose and explores incentives that local governments have traditionally offered to attract private developers. Part Two investigates the possibilities of a more egalitarian model of urban redevelopment by applying the Interest Convergence Theory to the urban renewal plans. Part Three proposes a more egalitarian redevelopment model using redevelopment plans in New Orleans Post-Hurricane Katrina as a promising example. Ultimately, the Article will explore the ways in

following pieces of information. According to the final report on urban renewal, there were 2,532 urban renewal projects in 992 cities. [citing Garvin, The American City, 1996). A number of authors have reported that 75 percent of the people displaced were people of color and 63 percent were African Americans. . .”

12 See James Boyd White, Economics and law: Two Cultures in Tension, 54 Tenn L. Rev. 161 (1986) reprinted in ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS BY EMMA COLEMAN JORDAN AND ANGELA P. HARRIS, 33-34, FOUNDA TION PRESS. As Boyd explains, some of the assumptions of microeconomics are that: “The Universe is populated by human actor, each of whom is competent, rational and motivated solely by self-interest. External to the human actors is a natural universe that affords what are called “resources,” which are acted upon by human actors to create something called “wealth”. . . Each actor is assumed to be motivated by an unlimited desire to acquire or consume. Since each is interested only in its own welfare, each is in structural competition with all others . . . The final ingredient is money, a medium in which surplus can be accumulated with convenience and, in principle without limit.


which the interests of developers and politicians may converge with those of the homeowners and renters in urban renewal cases.

I. PUBLIC PURPOSE AND THE TRADITIONAL USE OF INCENTIVES IN URBAN RENEWAL PROJECTS

Eminent domain is the power of the government to expropriate private properties. The Constitution does not explicitly grant this power. Instead, the Constitution tacitly recognizes that the power to expropriate inheres in governments and requires, in the Takings Clause, that the government pays “just compensation” in exchange for an expropriation. “Just compensation” attempts to balance a valued interest in property rights with the government’s need to sometimes appropriate private property for public benefit. Eminent Domain continuously position the sacrosanct rights of individuals to their property against the need of government to make decisions consistent with the welfare of the general public. The evidence of the sanctified nature of individual property rights lie in the very admonishment of the Framers that property shall not be taken without “just compensation”. Armed with such protection, it is no surprise that private owners become incensed when those property rights seem to be endangered by Taking decisions that seem to fall out of the scope of “public welfare” and seem to fit closer to that of private interests. In the early years of the United States, subsequent to the passage of the Bill of Rights, the Takings’ Clause served as a tool to achieve a proper structuring of cities and communities. At that time, the public use mandate of the Taking Clause was carried in its literal

15 See United States v. Carmack, 329 U.S. 230, 241-42 (1946) (confirming that Eminent Domain is “a tacit recognition of a pre-existing power”).
16 U.S. Const., 5th Am. (stating “nor shall private property be taken for public use, without just compensation.”).
19 U.S. Const., 5th Am. (stating “nor shall private property be taken for public use, without just compensation.”).
meaning in that it granted permission to local government the right to use private property for the creation of items open to the general public. 20

A. Kelo And the Evolution of Public Purpose

The tension between the sanctity of property rights and the government’s need to sometimes limit property rights – either through regulatory taking or expropriation – has given rise to substantial litigation. 21 Over time, the Supreme Court has developed a robust interpretation of the Takings Clause to resolve conflicts that arose about taking itself (what constitutes a taking and under what circumstances the government may take private properties) and the meaning of “just compensation,” under the Constitution. I will examine three important Supreme Court cases, Berman, Midkiff, and Kelo, to analyze the evolution of public purpose.

Eminent domain triggers controversies because many perceive it as an extreme form of governmental intrusion. 22 The government, in turn, argues that eminent domain is necessary to solve holdout problems that market inefficiencies create. 23 The government further argues that most public use or redevelopment projects acquire private properties through ordinary means.

The use of eminent domain is designed to be a tool of last resort, to be used only in the case of holdout by one or more property owner. 24 In this context, eminent domain is believed to be

20 See Eric L. Silkwood 109 WVLR 521-522, 503, (stating: “The interpretation of public use as public purpose endured as the method of determining proper and improper takings into the mid 1900's”)


22 See Gideon Kanner, SM006 ALI-ABA 15, 19, July 2007, Planning? We Don’t Have to Follow Any Stinkin’. . . (Stating “it is now the widespread and not unjustified popular perception that the Court de facto declared economic war on people's most cherished possessions -- their homes that are not merely their "property," but also are traditionally thought of as places of security and repose, as well as places of family refuge that is secure from government intrusion” See also, Dennis J. Coyle, 42 Cath. U. L. Rev. 817, 847, Catholic University Law Review, 1993, Takings Jurisprudence and The Political Cultures of American Politics (stating “the courts' confusion of takings doctrine with substantive due process has lessened the effectiveness of federal and state takings clauses as shields against government intrusion. When these two concepts are treated as one, with a single, rational basis standard so watered down as to permit virtually anything to pass, these protections of rights become empty shells.”)

23 See Richard A. Posner, Economic Analysis of Law 62 (1998) (arguing that "a good economic argument for eminent domain…is that it is necessary to prevent monopoly.").

useful to prevent a few property owners from thwarting the intended public benefit the
government anticipates will flow from the taking.  

In the early period of takings jurisprudence, traditional eminent domain cases, mostly
state cases, involved disputes over the taking of private properties to build highways and public
roads. In 1875, the Supreme Court confirmed the state’s court’s interpretations by
limiting the use of eminent domain to "forts, armories, and arsenals, for navy-yards and
light-houses, for custom-houses, post-offices, and court-houses. . ." The Supreme Court
did not deviate until the middle of the twentieth century.

In recent years, however, the Supreme Court has embraced a broader notion of takings
for public use purposes, culminating in a broader notion of “public purpose” jurisprudence
announced in *Kelo v. City of New London*. The Supreme Court decided *Berman v. Parker* in
1954, finding the type of taking under review to be within the public use language of the Fifth
Amendment. *Berman* involved a private owner’s challenge to the condemnation of his property
under the District of Columbia Redevelopment Act of 1945. The Act allowed the use of
eminent domain to redevelop slums and blighted area and the sale or lease of condemned lands
to private buyers. The private owners argued that their properties could not be taken because they
were commercial properties, because the properties were not in a slum, and because the

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26 Katherine M. McFarland, Boston University Public Interest Law Journal, 2004, Privacy and Property:
Two Sides of the Same Coin: the Mandate for Stricter Scrutiny for Government Uses of Eminent Domain
(Stating: “The practice of eminent domain--the government's power to take private property for public use--
was recognized by common law and originally used to facilitate the buildings of public roads, schools, and
post offices”. Also See generally United States v. Chicago, 48 U.S. 185, 194 (1849), Dickey v. Maysville,
Washington, Paris and Lexington Turnpike Road Co., 37 Ky. 113 (1838).
27 Kohl v. United States, 91 U.S. 367 (1875)
28 See Katherine M. McFarland, Boston University Public Interest Law Journal, 147, 2004, Privacy and
Property: Two Sides of the Same Coin: the Mandate for Stricter Scrutiny for Government Uses of Eminent
Domain quoting Kohl v. United States, 91 U.S. 367 (1875)
30 348 U.S. 26, 33.
31 Id. at 28.
government would transfer their properties to private interests. The Berman Court rejected the private owner’s argument, holding that “the concept of the public welfare is broad and inclusive…. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” The Court denied the private owner’s challenge and found the taking to be lawful.

The Berman Court rejected the invitation to second-guess the legislature’s determination that the use of eminent domain would benefit the public. The Court embraced the notion of public purpose as the constitutional prerequisite for the exercise of eminent domain power. This expanded view of “public use,” –public purpose, in particular – is far removed from the Court’s early views that eminent domain should only be exercised when the use is one that is specifically open to the public.

The Court revisited eminent domain thirty years later in Midkiff, where it held that the government may condemn private land to break up land ownership oligarchy in order to reestablish a free market. The Court again followed Berman’s flexible interpretation of the public use doctrine – public purpose. Adopting the deference-to-legislature approach in Berman, Justice O’Connor argued that the role of the Court in determining public purpose is very narrow and should be invoked only when absolutely necessary. She argued that “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.” She continued:

There is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in Berman made clear that it is “an extremely

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32 Id. at 31.
33 Id. at 33.
34 Id. at 33.
35 Id. at 36.
36 Berman, 348 U.S. at 31.
37 Prior to 1875, the federal government did not make any definitive statements on the scope of the “public use” admonishment of the takings Clause. The state courts tackled taking for “public purpose” approving uses such as the building of a University, a road and a river. (See generally, Univ. of N.C. vs. Foy, 5 N.C. 58 (1805), Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass. 344 (1829), Bonaparte v. Camden & A. R. Co., 3 F. Cas. 821 (1830).
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narrow” one. The Court in Berman cited with approval the Court’s decision in Old Dominion Co. v. United States, which held that deference to the legislature’s “public use” determination is required “until it is shown to involve an impossibility.”

The debate surrounding the definition of public purpose reached its peak in the Kelo decision in 2005. In further broadening the public purpose doctrine, the Court argued that public purpose extended beyond public use.

In 1990, the City of New London was classified by a state agency as a distressed city. In 2000, the city approved a development plan that would create one thousand jobs, raise revenue, and renew the city. Having acquired most of the land needed for the renewal, the city developers instituted condemnation proceeding to acquire remaining land through eminent domain. The Supreme Court was asked to determine whether the city’s economic rejuvenation scheme served a public purpose within the meaning of the Takings Clause.

Among other arguments, petitioners contended that economic development should not serve as the basis for a taking, nor should the city be able to use eminent domain to take non-

41 Id. at 240 (citing Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925)).

42 See Generally Bruce Ackerman, Private Property and the Constitution 190 n.5 (1977); Richard Epstein, Takings: Private Property and the Power of Eminent Domain 162 (1985); Margaret Jane Radin, Reinterpreting Property 136-37 (1993) See Also Wendell E. Pritchett, 21 Yale L. & Pol’y Rev. 1, 50, 2003 The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain” (stating “several recent law journal articles have critiqued the current interpretations of the doctrine. These scholars argue that eminent domain is used by "rent seeking" groups that want to avoid private market negotiations. They also claim that eminent domain is abused by public authorities that are controlled by private developers, and they argue for a stricter application of the Clause...” See Rindge Co. v. Los Angeles County U.S., 262 U.S. 700, 43 S.Ct. 689, 1923, stating: “The nature of a use, whether public or private, is ultimately a judicial question. However the determination of this question is influenced by local conditions; and this court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be ‘deemed public uses in any state . . . ‘” (stating that the sue of Eminent Domain for a Public Highway qualifies as public use.

42 The term “public purpose” and “public use” are synonymous in this Article. I tried to restrict the use of “public use” to when it is present in quoted materials only. Courts often refer to “public purpose” and “public use” interchangeably. The author honors that use of the term in the cited excerpts duplicated in the Article.

43 Because the debate is beyond the scope of this Article, I will use “public purpose” and “public use” synonymously in the rest of this Article. I, however, preserve “public use” in quoted materials.

44 Kelo, 545 U.S. at 479 (declaring that “this ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’ ” (quoting Midkiff, 467 U.S. at 244.) Rather, the Court “embraced the broader and more natural interpretation of public use as ‘public purpose.’”) (citing Fallbrook Irrigation Dist. V. Bradley, 164 U.S. at 158-64).

45 See Kelo v. City of New London, Conn. 545 U.S. 469, 473, (stating: “In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A.2d 500, 507 (2004) . . ”

46 Kelo, 545 U.S. at 472.

47 Id.

48 Id.
blighted areas. Petitioners asked the Court to “adopt a new bright-line rule that economic development does not qualify as a public use.” The Court rejected the invitation, arguing that “[p]romoting economic development is a traditional and long accepted function of government. [And there is] no principled way of distinguishing economic development from the other public purposes [the Court has] recognized.”

completed the public purpose expansion, permitting the taking of private properties for economic rejuvenation absent any blight. The court admitted that “those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area,” but gave deference to “[the City’s] determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.”

The Court sanctioned the power of government to allow private developers to take private properties for redevelopment under the eminent domain power. The Court’s expansion of public use to public purpose is helpful to support the arguments for extending the meaning of public purpose that I propose in this Article. If, as stated in Berman, public purpose can represent values that are “spiritual as well as physical,” intangibles such as social capital should be considered in the implementation of urban renewal plans.

II. INTEREST CONVERGENCE AND PUBLIC PURPOSE REDEFINED: A UTILITARIAN JUSTIFICATION FOR REFORMS IN URBAN REDEVELOPMENT CASES

49 Id. at 484.
50 Id.
51 Id.
52 Kelo, 545 U.S. at 473
53 Kelo, 545 U.S. at 473
54 Id.
55 See infra note 50.
56 See Eric L. Silkwood 109 WVLR 503 493 (noting “The United States Supreme Court's decisions in Berman v. Parker and Hawaii Housing Authority v. Midkiff, two seminal cases in the development of eminent domain law in the United States, are illustrative of the Court's new, less restrictive approach to the use of eminent domain power. These decisions introduced a broader interpretation of ‘public use’ by giving a great amount of deference to legislative definitions regarding what constituted a valid public use”).
57 348 U.S. at 33.
58 Social capital refers to the value that the intangible contributions of individuals such as, cooperation, camaraderie, a sense of unity, add to particular community. This idea is explored in further details at the end of section two of this article. See Sheila R. Foster, The City as an Ecological Space: Social Capital and Urban land Use, December 2006, 529, 82 NTDLR 527.
A. Interest Convergence Defined And A Consideration Of Ways Of Converging Economic Interests For The Public Good

In his seminal article, *Brown v. Board of Education and the Interest Convergence Dilemma*, Derrick Bell discussed the import of interest convergence in civil rights cases:

> The interest of Blacks in achieving racial equality will be accommodated only when it converges with the interests of whites...the Fourteenth Amendment standing alone, will not authorize a judicial remedy providing equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.  

Bell specifically referred to the events that culminated in *Brown* and demonstrated that the Supreme Court’s decision in *Brown* correlated with the interest of the United States, at the time.  

As demonstrated in the case of desegregation, a coalescence of interests across sectors can aide in the protection of marginalized individuals.

In the urban renewal context, the interests converging are typically those of city officials and developers in order to accomplish the designated project. Unfortunately, the city officials and developers’ perception of public good often fails to consider the interest of economically

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60 According to Bell, “first, the decision helped to provide immediate credibility to America’s struggle with communist countries to win the hearts and minds of emerging third world people. At least this argument was advanced by both the NAACP and the federal government. Second Brown offered much needed reassurance to American Blacks that the precepts of World War II might be given meaning at home. Returning Black veterans faced not only discrimination, but also the violent attacks in the south rivaled those that took place in World War I. Finally, there were whites who realized that the South could make the transition from a rural plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state sponsored segregation. Thus, segregation was viewed as a barrier to further industrialization. Here as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. As with abolition, though, the number who would act on morality alone was insufficient to bring about the desired racial reform.

Derrick Bell, Brown v. Brown v. Board of Education and the Interest Convergence Dilemma, in Critical Race Theory: The Key Writings That Formed the Movement 20, 23 (Kimberlé Crenshaw, Neil Gotenda, Gary Peller & Kendall Thomas eds., New Press 1996). See Also Other scholars have also supported the interest convergence theory in her historical analysis of the events that culminated to desegregation. According to Mary Dudziak, the United States was under such international scrutiny at the time, that the Brown decision was an opportune and important moment to clean up the United States' image and show the world that America’s propaganda about democracy was a reality on America’s soil.

61 See eg. Eric L. Silkwood 109 WVLR 523 493 (showing the interplay of the city’s interest and private investors in Mississippi: “…”It's not that Nissan is going to leave if we don’t get the land. What's important is the message it would send to other companies if we are unable to do what we said we would do. If you make a promise to a company like Nissan, you have to be able to follow through’. Clearly, the corporate dollars meant more to the Mississippi Development Authority than the Constitutional rights of the minority homeowners whom they sought to uproot and displace. "


marginalized residents. Urban renewal projects not only attract new businesses to poor neighborhoods, but they often result in substituting the low-income residents and buildings formerly in that neighborhood with professional, middle class commercial and residential edifices. 62 These projects are popular and can be very successful as formerly poor and isolated neighborhoods, over a period of five to ten years, become coveted by affluent developers. These changes can also contribute to more stable economies and provide opportunities for city officials to receive accolades.

Richard Posner, proposed that people are “rational maximizers of their satisfactions . . . [and] nothing they do is motivated by the public interest.” 63 He further asserted that market inequities should be resolved by market participants’ own motivations and not by external regulations. 64 In redevelopment cases, the maximization of satisfactions, in the form of incentives, is not a new phenomenon. In fact, local governments and private developers regularly develop incentives to attract the services and attention of one another. The quid pro quo relationship between private developers and city officials 65 is illustrated in the following:

Cities aid in redevelopment by entering into public-private partnerships to write down land acquisition and development costs by using regulatory freezes and eminent domain power and by providing a number of business incentives to companies willing to relocate and participate in residential and commercial (entertainment and retail development projects. This is done with geographically targeted commercial tax incentives such as enterprise zones, creative financing techniques such as tax increment financing, favorable taxing policies such as under-

62 See, Audrey McFarlane stating: “the current market for inner-city space coincides quite evenly with a decades-old policy of cities trying to attract the upper-middle class to the city. Arguably, the discovery has been partially fostered and guided by the deliberate intervention of state and local governments through an explicit and pointed policy to attract affluent residents. This intervention by state and local government has taken many forms: incentives to urban professionals to locate in certain neighborhoods such as first-time homebuyers programs, settlement cost forgiveness programs, other incentive grants and loans for purchasing residential real estate within the city, and favorable re-zonings of industrial property to facilitate residential occupancy, The New Inner-City: Class Transformation, Concentrated Affluence and The Obligations of the Police Power, 6, U. Pa. J. Const. L. 1 (Jan. 2006)


64 Id

65 Also see the proposed redevelopment plans for New Orleans where one of the stated goals is to “Identify and facilitate financially responsible developers to develop large numbers of houses quickly in Target Development Areas” http://www.npr.org/documents/2006/jan/CityPlanningFinalReport.pdf. This goal illustrates the traditional interdependence exiting between cities and private developers.
assessment of commercial property values, or even the waiver of taxes through nominal payments-in-lieu-of-taxes (PILOTS). 66

In these examples, developers and city officials maximize their satisfactions by finding common points of interests. 67 In the last example, the converging interest between the city officials and the private developers was the desire to attract lucrative business to the particular neighborhood. In light of that common interest, private developers and city officials had great incentives to collaborate. 68 Each party could use their status to place the other party in a better position. City officials use eminent domain to acquire needed property and private developers acquire funding to implement development plans. In the context of urban renewal, it is clear that the perennial “invisible hand” described by Posner, traditionally believed to be at play in all market transactions, cannot be relied on to redress all inequities.

In a society where supply and demand is a major motivation, economically marginalized individuals lack bargaining power. 69 They are unable to participate in the market and they become unfortunate casualties. 70 As a result, economically marginalized individuals have fewer


67 See Barbara L. Bezdek, To Attain “the Just Rewards of So Much Struggle”: Local Resident Equity participation Urban Revitalization, 35 Hofstra L. Rev. 37, 39 2006 (stating “around the United States, cities are being remade through increasingly intricate and opaque "public/private partnerships" ("PPPs"), by which local government agencies trade essential infrastructure at low or no cost in exchange for a profit-sharing stake or other return on the city's investment.

68 35 Hofstra L. Rev. 37, 39 2006 (stating “today's public/private cooperation has its origins in the first federal revitalization programs. Congress designed its redevelopment programs to be federally funded and driven, but implemented at the local level. Passage of the Housing Act of 1949 was secured by an amalgamation of disparate interests who saw what they wanted to see in the program. More specifically, "[h]ousing advocates thought it would result in additional affordable housing, while developers saw it as an economic opportunity." Local jurisdictions realized it would give them the tools to clear away blighted eyesores and to build preferred developments in their place with the Federal Treasury footing the bill. . .”) 69 See generally Robert E. Prasch, Toward a "General Theory" of Market Exchange (questioning “the presumed homogeneity of rational economic actors”)

70 See Kit Sims Taylor for a discussion of Keynes' critics of neoclassical economists tendency to rely on assumptions: “. . .Another problem came from ignoring the actual institutional arrangements by which wages and prices were set. Most wages and many prices did not immediately fluctuate with changes in supply or demand. Firms would usually reduce employment long before they would cut wages; and reduce output before they would cut prices. Yet neoclassical theory was based on 'ideal' markets in which price would rise or fall to bring about a new equilibrium of supply and demand. Rather than revise their theories to fit the actual conditions of the world, economists were more likely to find fault with the world for not living up to their theories (quoting Keynes):
ways to maximize their interests. Taking these limitations into consideration, how then do we proceed to include the interests of the non-market participants (those economically incapable of participating) in order to prevent their marginalization? Posner concedes that non-monetary and intangible incentives can be a considerable force in the market and that they can create palpable shifts in the conduct of business. The concerns generated by the post-Hurricane Katrina redevelopment efforts encapsulate the potential effects of non-monetary incentives in redevelopment cases. The displacement faced by many of the hurricane victims is an example of what can happen when the interests of non-market participants are overlooked. The redevelopment issues facing post-Hurricane Katrina should not be viewed as exceptions to the issues usually present in urban renewal projects. The underlying threat of excluding disenfranchised individuals is integral to urban renewal, and palpable in post-Hurricane Katrina redevelopment efforts. It is commonly the case, however, that marginalized individuals will continue to be overlooked if points of interest convergence are not identified.

“The classical theorists resemble Euclidean geometers in a non-Euclidean world, who, discovering that in experience straight lines apparently parallel often meet, rebuke the lines for not keeping straight -- as the only remedy for the unfortunate collisions which are occurring. Yet, in truth, there is no remedy except to throw over the axiom of parallels and to work out a non-Euclidean geometry. Another difficulty came from neoclassical economists' reliance on logical time rather than real time. Logical time has no direction: it can run backward as easily as forward. When supply forces meet demand forces to determine equilibrium price it is as if time does not exist at all. Most of the conceptual devices of neoclassical economics do not exist in real time. Logical time has no turning points or deadlines. When an economist says excess unemployment will disappear in the long run, how long is that? And what other changes will occur that require further adjustment before we ever arrive at 'the long run'? Keynes recognized that we move from one short run to another and that real economic problems must be solved in real time -- before the next election or before mass unemployment threatens the continuity of economic institutions central to capitalism or political institutions central to democracy: This long run is a misleading guide to current affairs. In the long run we are all dead. Economists set themselves too easy, too useless a task if in tempestuous seasons they can only tell us that when the storm is long past the ocean is flat again, Human Society and The Global Economy, http://distance-ed.bcc.ctc.edu/econ100ksttext/keynes/keynes.htm. See also, Preserving Community in The City: Special Improvements Districts and The Privatization of Urban Realized Space, 

71 See Mindy Thompson Fullilove, M.D., ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT. RANDOM HOUSE, 1994
72 Id. In the Economic Approach to Law, Richard A. Posner asserts that “non-monetary as well as monetary satisfactions enter into the individual’s calculus of maximizing.”

73 Barbara L. Bezdek, To Attain “the Just Rewards of So Much Struggle”: Local Resident Equity participation Urban Revitalization, 35 Hofstra L. Rev. 37, 39 2006 (stating that “the victims least able to escape …[hurricane Katrina] and last to be remembered in emergency planning and evacuation were predominantly poor, black, elderly, and disabled.)

74 Barbara L. Bezdek, To Attain “the Just Rewards of So Much Struggle”: Local Resident Equity participation Urban Revitalization, 35 Hofstra L. Rev. 37, 40 2006 (stating “Over the years, much redevelopment has been sharply criticized for its displacement of the poor people who lived where local officials yearned to rebuild. The irony is that the plain purpose of the first national Housing Act was
Rather than exhausting efforts to change individuals’ motivations, it will be useful to investigate how to capitalize on merged interests. While self-motivated actions are arguably the ideal form of altruism, it is probably more realistic and, perhaps more productive, for advocates of economically marginalized individuals to concentrate “post-Brown” strategic energy on providing utilitarian incentives for change. If we are to remain true to the realism that forms the basis of the “interest convergence” theory, it is unlikely that social change will result solely out of the sheer good will of people. Consequently, it might be more effective to focus on strategies that will provide the most incentives for these changes to occur.

Economic strategizing has been used in other spheres to explain or to affect market forces. Recently, for example, many companies changed their hiring practices through interest convergence. For these companies, diversity became a business decision because several of their consumers and clients are people of color. Continued growth meant hiring and promoting traditionally underrepresented persons. From the consumers and clients’ perspectives, they would only support businesses with diverse workforce. Many of the consumers and clients have vested interest in diverse workforces because they are people of color themselves. Others have a social interest (perhaps business interest) in doing business with diverse companies. Therefore, a common interest in diversity is fudged between companies and their consumers and clients.

displacement of the poor. The Act required that redevelopment occur in a "slum area or a deteriorated or deteriorating area which is predominantly residential in character," but did not require that any demolished housing be replaced...

75 See R. H. Coase discussing Adam Smith’s view on the dangers of relying on benevolence alone as a source of change. He states: “the great advantage of the market is to use the strength of self-interest to offset the weakness and partiality of benevolence, so that those who are unknown, unattractive, or unimportant, will have their wants served”, Adam Smith’s View of Man. 19 J.L. & Econ. 529 (1976) reprinted in Economic Justice: Race Gender, Identity and Economics by Emma Coleman Jordan and Angela P. Harris, Foundation Press, NY 2005.
76 See Steven Ramirez, Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What To Do About It, Washington and Lee Law Review, (2004), stating: “economic theory can nevertheless help explain the strategic behavior of CEOs in this context. Game theory suggests that much behavior can be explained by substituting strategic behavior (where actors have knowledge of and are influenced by the expected behavior of others) for mere rational maximization in the context of impersonal markets. This strategic behavior is a function of each actor's expected payoffs, determined in light of the expected behavior of other actors.68 A fundamental heuristic of game theory is the Prisoner's Dilemma. The Prisoner's Dilemma illustrates how two parties striving to maximize their payoffs will conduct themselves in a way that may not maximize their joint welfare, once they take into account the behavior of others. Assume two individuals are in custody for suspicion of a crime. If they cooperate and agree not to testify against each other, they would serve two-year sentences as the result of a plea bargain. If one confesses and testifies against the other at trial, the confessor will receive a one-year sentence, and the other will receive a ten-year sentence. If both confess, they will receive sentences of five years. Obviously, the best option is for neither to confess, for they would then only serve a combined four years. Nevertheless, if they do not know what the other will do, they are each best served by confessing, which eliminates the worst outcome and creates an opportunity for the confessor to serve only one year. If both do this, which they rationally may, they jointly serve ten years instead of four. Simply stated, their strategic behavior will prevent both from rationally maximizing their utility.”
Tax deductible donation is another form of interest convergence. Institutions often seek large donations from individuals or companies in exchange for both tax deduction and social or public recognition for the donor. For example, universities regularly name buildings after their benefactors who also get to deduct the donation from their taxes. Such exchanges are mutually beneficial to both parties because they have found ways to bring together disparate or previously unknown interests. The institutions amass the donations they need to complete a beneficial project while the benefactors receive social or public recognition for their altruism.

The foregoing are analytically useful for post-Hurricane Katrina redevelopment project in New Orleans. Through interest convergence, these examples are paradigmatically useful in bringing together traditionally conflicting interests and for protecting disadvantaged persons.77

The redemptive power of interest convergence has already manifested itself after Kelo. Following public uproar against the Kelo decision, local legislators have enacted legislation countering and limiting its impact.78 Some states have reacted to Kelo by prohibiting the use of eminent domain when the property is to be transferred to private parties.79 Others have specified

77 The ongoing debate triggered by the Kelo renders this a ripe time to re-evaluate implementation of renewal projects. Recently, redevelopment cases have received particular attention as the power of eminent domain has been used to justify the taking of private property by private developers. The determination of the particular criteria that justify a taking for public purpose has been greatly debated in our jurisprudence. Kelo, 545 U.S. at stating: "In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek."

78 See the memo posted by the National Conference of State Legislatures at http://www.ncsl.org/programs/natres/EmindomainMemo.htm which discusses the steps taken by some jurisdictions in response to Kelo v. City of New London: “Categories of Legislation NCSL has been tracking five types of legislation that state legislatures have either considered or are still considering since the decision in Kelo was reported. Each category restricts the use of eminent domain for economic development purposes to some degree, while providing certain exceptions. A broad range of approaches have been employed, from reiterating that eminent domain may be exercised solely for a public use, to prohibiting it for specified purposes. [1] Authorization for a Public purpose[:] Stipulates that eminent domain may be used only for a "stated public purpose" or a "recognized public use." (Delaware enacted this type of approach at the end of its 2005 regular session. . . . [2] Restriction of Use to Blighted Properties [:] Limits the use of eminent domain for economic development purposes to blighted properties only, or to areas where the majority of properties are blighted and the remaining parcels are necessary to complete a redevelopment plan. . . . [3] Enhanced Public Notice, Hearing and Negotiation Criteria[:] Requires local governments to hold public . . . hearings before condemning property for economic development purposes; notify affected property owners in advance of a hearing; and negotiate in good faith with property owners before condemning land. . . .[4] Local Government Approval [:] requires a vote of the locally elected legislative body before a redevelopment agency may initiate eminent
that eminent domain should be restricted to blighted communities alone. Nationwide, activists across the political spectrum have joined together to share concerns about the impact of *Kelo*.

The collaboration has provided a space for the activists to find a common ground for the protection of property rights and fear of abuse of power by the state.

**B. Redefining Public Purpose**

A mere interest in protecting traditionally recognized property rights is insufficient to address the needs of people marginalized by inequitable urban renewal plans. In addition, such a narrow view consistently undervalues the non-pecuniary investments that all individuals make in a community. The displacement of the poor members of the redeveloped communities still remain a problem. Those displaced range from individuals whose houses are destroyed in anticipation of the redevelopment (if public housing) to those who have unequal bargaining power with the city and developers and are subsequently forced to sell their property below fair-market value. Others, unable to afford the rent in the newly developed neighborhoods, are forced to find lodging in more remote neighborhoods or even other cities or states.

We can equitably implement urban renewal plans by redefining public purpose. As discussed above, an adequate definition of public purpose should include protecting poor residents and preventing their displacement.

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80 Barbara L. Bezdek, *To Attain “the Just Rewards of So Much Struggle”: Local Resident Equity participation Urban Revitalization*, 35 Hofstra L. Rev. 37, 38 2006 (comparing her perceived pre-Kelo apathy towards individuals displaced by urban renewal to “the outrage that followed the Supreme Court’s *Kelo v. City of New London* decision”)

81 Lance Freeman and Frank Braconi, *Gentrification and Displacement: New York City in the 1990’s*, Journal of the American Planning Association, Vol. 70, No. 1, 50, Winter 2004 (stating . . . “disadvantaged households who wish to move into these neighborhoods may not be able to find an affordable unit, as may disadvantaged households in gentrifying neighborhoods who wish to move their neighborhood. Moreover, if gentrification occurs [in] sufficiently wide scale, it could result in a gradual shrinking of the pool of low-cost housing available in a metropolitan area.”)

82 *Kelo v. City of New London*, 125 S.Ct. 2655, 73 USLW 4552, 60 ERC 1769
While the majority in *Kelo* contends that “the achievement of a public good often coincides with the immediate benefit of private parties,” the reality still remains that the interests of the public often conflict with the interests of private developers. As it stands, the current application of the public purpose standard is so broad that it is subject to manipulation. A re-definition of public purpose should include a protection against displacement of economically marginalized individuals. Non-displacement can be achieved by offering incentives for developers and city officials to work together to craft protections for vulnerable members of society in addition to their other goals. One manner in which incentives can be created is to organize a bottom-up movement where citizens will put pressure on local officials through grass-roots organization. A bottom-up movement can serve as a check on city officials who in turn will have to include the community’s interests in their negotiations with developers. The private developers, needing the city officials for licenses and land acquisition will have an incentive to cooperate with the city and the public’s wishes. As a result, the interests of city officials, private developers and the public can all converge.

This convergence of interests is being played out in the redevelopment of New Orleans after Hurricane Katrina. The redevelopment plan exposed the inadequacy of present public purpose doctrine and a need for redefinition. The local government issued its initial plan for redevelopment and received nationwide criticisms. In the past year, it has become clear that

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83 Id. at 2666

84 See Gideon Kanner: “Kelo has inspired a widespread and vigorous reaction by the public and press primarily because it is a case of reductio ad absurdum, meaning that its premise is flawed in that it deems almost everything to be a "public use." So long as developers and municipal functionaries predict that more money will be made from the subject property in the redevelopers' hands than its present owner's then the "public use" requirement is said to be met. This amounts to a sort of municipal do-it-yourself constitutional imprimatur because all the condemning municipality needs to do now is proffer self-manufactured plans for the proposed taking, even though, as discussed infra, condemnors are not obliged to carry out their plans and are free to engage in intrinsic fraud to take private property but then not use it as planned”, *Kelo v. City of New London, Bad Law, Bad Policy, bad Judgment*, 203, 38 Urb. Law 201

85 See Center For American Progress, Rebuilding Homes and Lives: Progressive Options for Housing Policy Post-Katrina stating (“The Bush administration initially proposed concentrating displaced families in large trailer parks, an approach that met considerable criticism from commentators across the political spectrum.”), http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/housing_brief.pdf
solutions that exclude the masses of displaced individuals will not be tolerated locally or nationally. 86

New Orleans provides a perfect example of how a traditional application of public purpose can disenfranchise large numbers of individuals. Justice Thomas addressed the potential negative effects of *Kelo’s* definition of public purpose in his dissenting opinion. He argued:

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for a public purpose is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. . . If ever there were justification for intrusive judicial review of constitutional provisions that protect “discrete and insular minorities, . . . surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak. 87

The rebuilding of New Orleans should force governmental entities to determine how to balance their economic interests and the needs of the poor populations in the areas subject to redevelopment. *Kelo* extends public purpose beyond the broad scope contemplated by the *Berman* Court. While *Berman* conceded that public purpose was not limited to a strict “public use only.” *Berman* did not stretch public purpose to allow transfer to another private interest. *Kelo’s* extension of public purpose has some redeeming potentials. It gives cities the flexibility to decide how to carry out the interest of all members of the community. City decisions that impose substantial burdens on some members of the community should fall outside of what should be considered public good.


87 Id. at 2687
A consideration of what constitutes public purpose is incomplete without computing the intangible investments that people make in their communities.

For some, the newly restructured city is the fulfillment of the post-modern American dream: a post-industrial, culturally hybrid aesthetic that covets urban life while implicitly rejecting some of its “grittier” aspects (read: diversity and certain inconveniences). For others, the restructuring signals a welcome change in community character from declining and impoverished to popular and affluent. All recognize that affluent people bring business and government attention and improved services to their neighborhoods. On the other hand, the changes are also viewed with a sense of fore-boding as residents who have experienced displacement or understand that rising rents will force them out and change the complexion of the neighborhood hold their breath or worry. Worse, the changes signal ominously that the residents’ departure from the community is imminent.88

89 The displacement of former residents triggers a loss for those displaced as well as for the neighborhood at large.90 Individuals invest their time and energy into shaping the identity of their particular geographic areas.91 These investments create an intangible value that renders the area more attractive to residents and non-residents alike. This intangible quality is often referred to as “social capital.”92 Social capital can be defined as “the way in which individuals and

89 Audrey McFarlane States: “Although many old central cities continue to experience overall population loss from the now decades old middle and upper-middle class exodus to the suburbs, the loss masks a dramatic, yet paradoxical, counter-trend. Since the late 1960’s and 1970’s, the number of upper-income professionals in centrally-located inner city neighborhoods, usually accessible from, if not close to, central business districts, has been slowly increasing as succeeding waves of urban middle class people are willing to breach the boundaries of the formerly taboo “inner-city.” The nature and pace of such repopulation during each period has varied, but the common characteristic has been the ongoing reconfiguration of the central city as a space for the affluent. As the single yuppie, the childless couple, and the empty nester in search of a newly valuable way of life continue to “discover” and claim new territory within the city, they are part of a complex process that is causing the transformation of urban space to suit their social needs and consumption tastes. Urban places that were once racialized as Black and classified as poor, dangerous, and off-limits to anyone of affluence and with choices, have taken on new meaning today. These places are now suppliers of housing that is relatively cheap, centrally located, and often architecturally rich. They are open territories for investment speculators, redevelopment agencies, and affluent professionals who reject the suburban form of living, but demand, and can easily pay for, luxury residential, commercial retail, entertainment, and other intangible spatial amenities, The New Inner-City: Class Transformation, Concentrated Affluence and The Obligations of the Police Power, 4, U. Pa. J. Const. L. 1 (Jan. 2006)
90 See Mindy Thompson Fullilove, M.D., ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT. RANDOM HOUSE, 1994
91 See Mindy Thompson Fullilove, M.D., ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT. RANDOM HOUSE, 1994
92 See Sheila R. Foster, illustrating how urban renewal often diminishes the social capital of a neighborhood” “Strong social networks can produce significant economic and social welfare gains for geographically defined communities, as numerous studies have documented. This capital can also be enhanced or diminished by land use and development decisions. Some decades ago the critic of modern urban planning, Jane
communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals.”93 The capacity for social capital to provide an invaluable quality to a neighborhood is described as purchasing power.94 Social capital can be “a critical resource in urban communities, especially in large cities where people can lead fairly atomized lives and in vulnerable neighborhoods where residents can only meet their economic and social needs through cooperation with others. Thus, where a community has sufficient amounts of social capital it can also ‘purchase’ many other social (and economic) resources that create and sustain healthy neighborhoods and, ultimately, healthy cities.”95

Characteristics like collective cooperation shared goals and shared values make up many poor communities’ social capital. When renewal plans are implemented, community members are dispersed and these intangible valuables completely disappear.96 Currently, the preservation of a neighborhood’s social capital is not computed into developers’ equation when making renewal

Jacobs, famously stood up (at least intellectually) to urban renewers in protest because they were destroying the "irreplaceable social capital" which constitutes the lifeblood of cities. She described this "social capital" as comprising the web of relationships and cooperative action between people who share a geographic space in big cities and/or an interest in maintaining a healthy neighborhood. What emerges from these relationships over time are established networks of "small-scale, everyday public life and thus of trust and social control" necessary to the "self-governance" of urban neighborhoods.

Cities are thus constituted of neighborhoods and communities, which come to manage themselves via networks of interested individuals who build and strengthen working relationships over time through trust and voluntary cooperation. This social capital is the “civic fauna” of urbanism, making the successful governance of cities possible. Once this social capital is lost, Jacobs argued, "the income from it disappears, never to return until and unless new capital is slowly and chancily accumulated", The City as an Ecological Space: Social Capital and Urban land Use, December 2006, 530-531, 82 NTDLR 527.

94 Id.
95 Foster uses studies conducted by sociologist Eric Klinenberg's comparing “how two very similar adjacent Chicago neighborhoods, one African-American and one Latino, of roughly equal size fared in one week of extremely hot weather in Chicago in July 1995 that left over 700 dead. The two neighborhoods, North Lawndale and Little Village, had similar numbers and proportions of senior citizens living alone and in poverty. Yet the two communities experienced very different outcomes during the heat wave: while North Lawndale endured nineteen fatalities, Little Village suffered only three deaths. Klinenberg illustrates how the vibrant street life and plentiful commercial activity of Little Village contributed to the safety of the elderly residents who matched the general profile of heat wave victims. Not only were low-income senior citizens in Little Village more likely to receive visits from concerned friends and neighbors than their counterparts in North Lawndale, even those seniors without social networks were more likely to venture out to air-conditioned stores or other public places, thanks to the busy streets and a greater sense of safety. In North Lawndale, by contrast, the rampant crime, proliferation of vacant lots and abandoned buildings--and general absence of any activities indicating a functional, safe community--imposed upon area seniors the brutal choice between staying inside to face the heat alone or going out to risk intimidation, robbery, or worse.”
96 See Mindy Thompson Fullilove, M.D., ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT. RANDOM HOUSE, 1994
decisions. The displacement from renewed neighborhoods, consequently, causes a reduction in the original value of the neighborhood and emotional trauma to its economically displaced former residents.

I. PROPOSAL FOR A MORE EGALITARIAN REDEVELOPMENT MODEL

While some jurisdictions have attempted to curb the exclusionary effects of using eminent domain for private development there still remain a number of factors that have inhibited creation of egalitarian redevelopment plans. Maryland provides a good demonstration of the challenges in public land use reform.

The Maryland legislature created a task force to study the effects of eminent domain on small businesses and develop policies to protect small businesses from the arbitrary use of eminent domain. This initiative was prompted by concern that the broad public purpose notion reiterated in Kelo does not truly consider the needs of all segments of the public. At the time the task force was created, Maryland law did not provide property owners with compensation for the value of closed businesses or lost revenue

97 See Foster describing the fact that social scientists are now realizing that social capital is undervalued. She states: “Even though many sociologists have traditionally assumed, based in part on William Julius Wilson's work, that poor communities lack adequate social capital and related resources, contemporary social scientists are beginning to question that assumption. Recent scholarship and empirical evidence is beginning to illustrate the "ecological fallacy" that equates high levels of poverty with social dysfunction and frayed community ties. For instance, a recent study by geographers at the University of Southern California provides evidence that "543 the landscape of concentrated poverty can differ dramatically depending upon place-specific local and regional forces, as well as broader economic forces. As we see increasing levels of differentiation among impoverished communities, we need to rethink the equation of low levels of social functionality and capital with poverty.” See also Eric Klinenberg, Heat Wave 86-87, 01-108, 116-21(2002). These examples demonstrate that a community’s reputation as poor and blighted does not mean that it lacks value. Such value should be maintained when making renewal decisions.

98 See Mindy Thompson Fullilove, M.D., ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT. RANDOM HOUSE, 1994

99 See Mayor and City Council of Baltimore City v. Valsamaki, 397 Md. 222, 916 A.2d 324, 327 (Md. 2007) (holding that the city of Baltimore must prove necessity related to a specified redevelopment plan before taking immediate possession of property via a “quick take” condemnation procedure).

100 See American Planning Association, Eminent Domain 2006 State legislation (providing a survey of state actions regarding eminent domain) http://www.planning.org/legislation/ eminentdomain/edlegislation.htm

101 Kurt J. Fischer and Melissa L. Mackiewicz, Eminent Domain Reform’s Failure in Maryland, 39-OCT Md. B.J. 14, 16 (September/October 2006).
during transition periods as a result of eminent domain.\textsuperscript{102} The task force was directed to study “(1) the concept of business goodwill and whether a business owner should be entitled to compensation for loss of goodwill, (2) the feasibility of requiring a condemning authority to study the impact of condemnation on businesses in the proposed area where condemnation will occur, and (3) the feasibility of a shorter condemnation process to lessen the uncertainty that the process creates for businesses”, in addition to outlining more generally the conditions that must be present before a public entity can attempt eminent domain proceedings in Maryland.\textsuperscript{103} While the task force did not recommend a ban on the use of eminent domain to further private development plans, it did make some suggestions geared towards protecting small businesses.\textsuperscript{104} Some of the protections suggested include requiring a condemning authority to demonstrate that it considered whether alternative plans might “avoid the acquisition of businesses or [] incorporate them in the redevelopment project,” provide compensation to business owners for lost assets of closed businesses or lost income during periods of business interruption as a result of condemnation; and providing relocation assistance businesses affected by eminent domain rulings.\textsuperscript{105}

Furthermore, recent Maryland cases have limited the government’s power to use eminent domain on an emergency basis.\textsuperscript{106} Despite these progresses however, Maryland has not yet amended its rules to prevent use of eminent domain for private development. A redefinition of

\textsuperscript{102} Id. at 16.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} See id. at 22-23.
\textsuperscript{106} Mayor and City Council of Baltimore City v. Valsamaki, 397 Md. 222, 916 A.2d 324, 327 (Md. 2007)
public purpose is especially needed in such a state, in which cities like Baltimore, are undergoing constant renewal.\textsuperscript{107}

Other commentators have expressed concern with Kelo’s broad reach\textsuperscript{108} and have encouraged similar limiting statutes\textsuperscript{109}. However, a number of issues remain to be resolved to ensure egalitarian redevelopments. As in Maryland, very few redevelopment laws address the difficulties that urban renewal causes to poor individuals, especially lessees. If the need to protect small businesses has proved compelling enough to induce legislative action, the need to protect low-income communities against the inequitable use of eminent domain should be even clearer. The plight of the poor was revealed in graphic and disturbing detail in the wake of Hurricane Katrina.\textsuperscript{110} As a consequence, the Post Katrina era is ripe for advocating for changes that will protect the rights of the poor in redevelopment cases. One way to create such change is by showcasing the incentives that will convince developers and cities to adopt such changes. One such incentive is that the non-displacement of the poor in redevelopment cases can help alleviate the existing racial/economic tension in the United States. Since a number of displaced individuals are disproportionately poor non-whites, carving protections for these groups sends a message that poor non-whites and poor individuals are valued members of our citizenry. Promoting such value will, in turn, benefit the elected officials who sponsor these initiatives.

\textsuperscript{107} See public protests in regards to John Hopkins appropriating of property to redevelop Middle East of Baltimore.


\textsuperscript{109} Id. at 39. See, for example, Gideon Kanner, Kelo v. City of New London, Bad Law, Bad Policy, Bad Judgment, 38 Urb. Law 201 (2006) (stating “Kelo... has precipitated a great deal of controversy. Large numbers of Americans were dismayed and angered to find that anyone’s unoffending home may be seized and razed to convert the site to a municipally favored redeveloper, on the theory that redevelopment will increase revenues and wages, thus tending to revitalize the community. Public opinion polls indicate that Kelo’s broad reading of the Public purpose Clause has left the great majority of Americans gasping with disbelief. Kelo has precipitated a flood of proposed (and in some cases enacted) legislation to curb this breathtaking expansion of unreviewable and unaccountable government power. A strong public reaction to a Supreme Court ruling is hardly a new phenomenon, but in this case its intensity and its ability to stir legislatures into immediate corrective action are, at least in my experience, unprecedented . . .”)

\textsuperscript{110} Michele Alexandre, At the Intersection of the United States’ Post-911 Immigration Practices and Its Domestic Policies: Can Katrina Serve as a Catalyst For Change? 322, Oxford Round Table Forum on Public Policy. Also see Alexandre stating: “The events in New Orleans exposed a hierarchical system based on race and class. Overnight, New Orleans was one of the most cherished cities of the United States to being described as “third world-like”... Time and time again commentators marveled that such misery was indeed taking place in America... As a consequence, the Post Katrina era is ripe for advocating for changes that will protect the rights of the poor in redevelopment cases. One way to create such change is by showcasing the incentives that will convince developers and cities to adopt such changes. One such incentive is that the non-displacement of the poor in redevelopment cases can help alleviate the existing racial/economic tension in the United States. Since a number of displaced individuals are disproportionately poor non-whites, carving protections for these groups sends a message that poor non-whites and poor individuals are valued members of our citizenry. Promoting such value will, in turn, benefit the elected officials who sponsor these initiatives. When successful, elected officials can benefit from such efforts by garnering the votes of members of the poor communities as well as the votes of others who share the same values.
When successful, elected officials can benefit from such efforts by garnering the votes of members of the poor communities as well as the votes of others who share the same values.

While most individuals would probably not have denied the existence of poverty in America before Hurricane Katrina, few probably were ready to face the ugly nefarious its consequences of the lives of America’s poor. This reality reinvigorated discourse concerning the role of government policy in the creation and alleviation of poverty in America. Decisions such as budget cuts for education and Medicaid programs have historically adversely impacted the lives of poor Americans, without the rest of the country experiencing the disastrous effects or the complete vulnerability in which poor Americans find themselves.111

Because of the dynamics produced by Hurricane Katrina, post-Katrina New Orleans has become the focal point for many advocates for equitable urban planning. While Hurricane Katrina placed redevelopment issues in New Orleans in a unique setting, the underlying issues of displacement remain the same112.

111 Michele Alexandre, At the Intersection of the United States’ Post-911 Immigration Practices and Its Domestic Policies: Can Katrina Serve as a Catalyst For Change? 332, Oxford Round Table Forum on Public Policy. Also see Alexandre stating: “The events in New Orleans exposed a hierarchical system based on race and class. The initial reaction to the stranded poor populace in New Orleans during Katrina, reveal systemic attempts to place the disaster in an immigration context. . . . The poor residents of New Orleans suffered from a similar treatment in the first four days of the crisis. Overnight, New Orleans metamorphosed from one of the most cherished city of the United States to being described as “third world-like”, a term which is usually charged with contempt and condescension. Time and time again commentators marveled that such misery could was indeed taking place in America. . . . Despite all these negative portrayals, the media attention Post-Katrina served to desensitize the general American population to poverty. As a consequence, the Post Katrina era is ripe for advocating for changes that will protect the rights of the poor in redevelopment cases. One way to create such change is by showcasing the incentives that will convince developers and cities to adopt such changes. One such incentive is that the non-displacement of the poor in redevelopment cases can help alleviate the existing racial/economic tension in the United States. Since a number of displaced individuals are disproportionately poor non-whites, carving protections for these groups sends a message that poor non-whites and poor individuals are valued members of our citizenry. Promoting such value will, in turn, benefit the elected officials who sponsor these initiatives. When successful, elected officials can benefit from such efforts by garnering the votes of members of the poor communities as well as the votes of others who share the same values.

112 As Mcfarlane points out:” Typically this devalued land is in Black and Latino inner city neighborhoods, and to a certain extent, in working-class White neighborhoods. The difference between the two is that there may be a higher percentage of owner-occupied housing in the White working-class neighborhoods and more rental properties in Black and Latino neighborhoods. As a result, the private real estate market was depressed, and the visible signifier of this depression and disinvestment was race. .The New Inner-City: Class Transformation, Concentrated Affluence and The Obligations of the Police Power, 17, U. Pa. J. Const. L. 1 (Jan. 2006)
Though in many cities the areas targeted for renewal are often disenfranchised neighborhoods, as indicated earlier, low-income dwellers are not included when designing new spaces and communities. In the case of New Orleans, the threshold requirement that the targeted area has experienced a “blighted” economy can easily be met in many areas of the region. Since most of the cities’ neighborhoods are still in poor shape, there exists a dangerous propensity to replace current communities with more upscale neighborhoods. This trend is commonly seen in the renewal process. As space will be needed to construct renovated homes and businesses some residents’ neighborhoods may be sacrificed and/or life in the new neighborhoods will simply become too costly.

This danger still lurks beneath proposed plans for rebuilding New Orleans. Among the plans for rebuilding, The Bring New Orleans Back committee listed:

1. Parks in every neighborhood;
2. Multi-functional parks and open spaces connect neighborhoods and employment;
3. Identify properties that can become part of the system [of redevelopment];
4. Secure funding for park restoration;
5. Complete acquisition of necessary properties and implement plan of private and publicly-owned land, blighted and adjudicated properties, and underutilized sites on high ground, or those requiring demolition and clearance, that can be developed with houses, commercial, and institutional uses;
6. consolidate public and private ownership;
7. Issue developer requests for proposals and select developers;
8. buy and sell property for redevelopment, including use of eminent domain as a last resort; 9. aggressively support a modified Baker bill to accommodate buy-out of homeowners in heavily flooded and damaged areas for 100% of pre-Katrina market value, less insurance recovery proceeds and mortgage.

For those skeptical of traditional urban renewal plans, the New Orleans rebuilding plans raise a number of red flags. Among those are: (a) the proposed use of eminent domain, (b) the designation that a park be placed in every neighborhood (which implies that some prior property

113 See Mindy Thompson Fullilove, M.D., ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT. RANDOM HOUSE, 1994

114 Barbara L. Bezdek, supra note 84, at 64 (stating “In today's urban boom cycle, however, much of the change in neighborhoods is created not by homesteaders but by private developers anointed by local government, which assembles land not to build roads or stadia, but to offer to private developers in a frank bid to remake space in its preferred, high-end vision.”)

115 James J. Kelly Jr., 80 St. John's L. Rev. 923, 961, 2006 "We Shall Not Be Moved": Urban Communities, Eminent Domain And the Socio Economic of Just Compensation, (stating that “redevelopment experts offer little more comfort to residents of poor neighborhoods when they tell them that they are being displaced to make way for new and beautiful homes for others. . .”)

will be used), and (c) the proposal that property owners be awarded compensation based on pre-Katrina property value. These items are red flags because they presuppose alterations of neighborhoods to formulations much different than those in existence before Hurricane Katrina. Displaced New Orleanians considering returning home will be offered accommodations in neighborhoods that no longer reflect their previous lives, thereby continuing their feelings of displacement. Furthermore, individuals often witnessed, after selling their property, that in newly redeveloped areas property value often increase upwards of five to ten times the purchase amount.  

Thus, having been reimbursed only the pre-Hurricane Katrina market value for their property, many homeowners might not be able to afford any property in their converted, post-renewal neighborhood. Some equity-based percentage must be computed in the compensation package. Finally, the proposal for redevelopment does not provide any compensation or housing allocation for residents who were renters and not property owners. Their displacement and inability to afford lodging in the new neighborhood will be just as real as for property owners. Consequently, renters must be compensated in some form for the value of intended use or that the projected difference between new rents and old rents be paid. Advocates for New Orleans residents should insist that city officials make their approval of development plans contingent on developers reserving units for poorer renters at affordable rates.

While there does not yet exist an exact numerical figure for returning New Orleanians, such uncertainty should not be deemed an impediment to an equitable implementation of renewal plans. Whether or not New Orleans residents choose to come back, they have an equitable interest in their neighborhoods that deserves protection from economic displacement and under-compensation. These individuals have made an emotional and social interest to the city and thereby, should be considered as having property rights in the community. Their social contributions, i.e. community developments, collective work, coalition building, protection of families and their neighborhoods, have facilitated the reputation of the Pre-Hurricane Katrina which many were eager to visit multiple times a year.

117 Id.
118 This increase of property value in developed areas is illustrated in such re-developed neighborhoods as Silver Spring Maryland, Downtown Memphis, Tennessee, Park Slope Brooklyn, Harlem NY, etc. Compared to the initial purchase price of properties in these neighborhoods fifteen to twenty years ago, the current market value of real property in these neighborhoods is more than ten fold.
119 A number of individuals are still living in FEMA trailer across the countries and a final tally of returning residents has not yet been reached.
The concerns faced by communities in New Orleans are consistent with those faced by other communities experiencing the results of renewal plans. Urban centers subject to renewal commonly struggle to balance the interests of builders with concerns that homeowners are under-compensated for taken property. The award of market value buy-outs to low-income homeowners is insufficient both to cover the predicted costs these homeowners will face, discussed above, and to compensate for the intangible value of the property to the individual homeowner. Considering the lack of bargaining power between low-income homeowners and commercial developers, low-income homeowners are often not in a position to negotiate the best price possible. In the valuation of property, developers often overlook

... the pesky question of the subjective understandings of the value and nature of property harbored by the owners of property. We would not be having this debate today if the owners of condemned property were made universally happy, or even more modestly not terribly discontented, by the loss of their private property to government-driven enterprises. But the subjective values that landowners place on their real property often exceed the more objective formulations of "fair-market value," the sine qua non of "just compensation." In short, sterile formulations of fair-market value often do not satisfy landowners who are losing their land to the forces of condemnation. And, while this does not matter in the sterile world of appraisals bounded by rules on the scope of the project, comparable value, income-streams, and the like, it matters very much to landowners how their land will ultimately be used. Put another way, landowners may not be particularly happy if they feel under compensated when their land is taken for a freeway, but they can understand the process and learn grudgingly to accept their fate. But a fair number of landowners just never learn to "get it" when their property ends up being used by a rich, powerful, and, above all, politically connected developer for private profit. Such private benefit condemnations rip the social compact to shreds, leaving very unhappy landowners behind.

Instead of merely awarding the market value to low income owners, city redevelopment plans should require that developers provide one of the two alternatives: (a) the approximation of the value of the property post redevelopment or (b) the value of the property pre-development plus a percentage of any future profits. City officials can be forced to include these terms as part of the negotiation package if adequate public pressure is used. In turn, private developers desirous

120 Barbara L. Bezdek, To Attain “the Just Rewards of So Much Struggle”: Local Resident Equity participation Urban Revitalization, 35 Hofstra L. Rev. 37, 94 2006
122 Barbara L. Bezdek, To Attain “the Just Rewards of So Much Struggle”: Local Resident Equity participation Urban Revitalization, 35 Hofstra L. Rev. 37, 94 2006
to attract more contracts will eventually come to view such concessions as ultimately the least costly alternative.\textsuperscript{123} This standard would be consistent with principals of fairness and justice an in accord with the spirit of the Takings clause of the Fifth Amendment.

Moreover, a more equitable solution for renters would be to condition building permits with requirements to designate specific affordable housing units to low-income individuals who stand to be displaced. As the level of accountability placed on New Orleans city officials illustrates, local governments have great incentives to encourage a fairer fractioning of property.\textsuperscript{124} In New Orleans, the pressure from grassroots activists and private individuals has forced the local government to be of the utmost transparency in redeveloping New Orleans.\textsuperscript{125} This type of accountability requires ongoing activism by invested parties to ensure that residents of low-income communities remain involved in developing and implementing the plans to rebuild their neighborhoods.

One positive outgrowth of the efforts to rebuild New Orleans is the demonstration that political incentives are not yet obsolete tools of change. For example, when New Orleans officials announced plans for rebuilding in January 2006,\textsuperscript{126} overwhelming outcry from local and national advocates forced the city to delay proposals, which called for unilateral decisions on which areas would be rebuilt.\textsuperscript{127} The seventeen member Bring New Orleans Back commission largely side-stepped that issue by creating thirteen districts where residents will work with planners to explore opportunities for rebuilding and work to determine how many people ultimately will return to the region.\textsuperscript{128} New Orleans officials, aware of the pressures of accountability to the public, were deliberate in their plan to include New Orleans residents in the decision-making process.\textsuperscript{129} This situation highlights Bell’s Interest Convergence Theory. The

\textsuperscript{121} This cost/benefit analysis is a calculation that Corporate entities often have to make in the face of public outrage. The recent Imus controversy, is one of the many examples of a Corporate entities deciding to minimize future lost by making decisions that might appear costly in the present. This balancing act is yet another example of the interest convergence theory at play.

\textsuperscript{122} Supra Note 90

\textsuperscript{123} This note 90


\textsuperscript{125} Id. See also Greg Allen, \textit{New Orleans officials Unveil Rebuilding Plans}, available at \url{http://www.npr.org/templates/story/story.php?storyId=5151102}

\textsuperscript{126} Supra note 90
New Orleans officials, after having received such bad press, for their collective failure to provide to the needs of its disadvantaged citizens during the Hurricane, needed to show the world that redevelopment will take place in conjunction with New Orleaneans.

The pressure for accountability can also motivate local governments to require that local developers designate units for low-income renters and potential homeowners. Since developers potentially will reap the most profits from redevelopment, and thus the displacement, city leaders have good reason to require developers to shoulder more of the costs related to displacement. The post-Katrina gulf coast is pregnant with possibilities for producing a model of more fruitful and non-exclusionary redevelopment. Katrina revealed that many white Americans have vested interests in making sure that economic measures benefit a larger group of Americans rather than a smaller number. There might be a vested interest for groups to ally themselves, not only along racial lines, but also economic lines and commonalities. Applying Derrick Bell’s “interest convergence theory,” many white Americans might now find that their interest for governmental transparency and efficiency converge with the poor individuals’ interest in being protected. The new awareness and visibility that media coverage brought to New Orleans caused everyone to feel invested in the success of New Orleans. The slow response to help New Orleaneans during the hurricane generated national sympathy for the region. Much like the international coverage of the brutality of segregation provided an opportunity for disparate interests to converge in the 1959s, a window now exists for socially diverse contingencies with inter-related interests to ally themselves with each other.

Due to public demand for accountability by New Orleans officials, the city’s government has been compelled to consider inclusive redevelopment plans. In the face of marches and protests by residents, covered by the national media, the city officials have had to re-assure

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130 A Number of Local Organization such as the People Organizing Committee, an organization dedicated to helping New Orleans residents with housing issues and with educating them about their legal rights and remedies.

131 See Alexandre stating: Hurricane Katrina’s devastating effect demonstrated that a huge number of the American population lives well below the poverty level and that, more than ever, race and class is tightly linked. In the surge of generosity that followed the disaster, one hopes that the old tendency to view the victims of poverty as irresponsible, lazy and deserving of their fate will now be seen as flawed. Post-Katrina discussions of poverty should center on the elements that contribute to the disenfranchisement of the poor and on how they can be defeated.

132 Supra Note 90.

residents that their concerns will be considered. The redevelopment plans are still tentative, but if the public pressure remains, city officials will have alter non-inclusive proposals. Hurricane Katrina not only accelerated the need for development, which was long overdue in many New Orleans neighborhoods, but also placed considerations of equity at the forefront of the redevelopment debate. 134

CONCLUSION

When the effects of redevelopment decisions on the lives of the poor are examined, it becomes clear that “just compensation” and “public purpose” must be re-assessed to prevent exclusion of the poor from their life-long residences and communities or, at least, insufficient compensation for their displacement. 135 Although courts have allowed eminent domain to be used for the benefit of private developers if it is used for public use, “beyond [this] general rule there is little or no agreement as to what constitutes public use.” 136 Many have expressed that the term “is elastic.”

I maintain that public purpose should be defined based on equitable considerations that incorporate the interests of economically vulnerable members of the community. The new definition not only benefits low-income residents by incorporating their predominant interests into the actual development plans, but would also provide long-term benefits to local officials by maintaining their political integrity and public accountability. These new urban redevelopment models will help provide a modicum of confidence and satisfaction in local officials’ commitment to poor communities and communities of color and might help create pecuniary resources that will help curtail resorts to violent crimes, which directly benefits wealthier members of a community.

134 Marcia Johnson, Addressing Housing Needs in Post Katrina’s Gulf Coast, 31 T. MARSHALL L. REV. 327, 329-30 and note 9. Johnson provides statistics demonstrating that in the years before Hurricane Katrina, “a third of New Orleans’s population paid 35% or more of their annual incomes for housing. . . almost 15% of the people in New Orleans lived in poverty before Katrina. . . 37.3% of New Orleans’s poor lived in concentrated poverty neighborhoods”, thus many lived beyond the Department of Housing and Urban Development’s (HUD) recommended affordability index.

136 Id.
Additional broad scale benefits of interest convergence that developing communities will likely manifest will include lowered crime rates, as a greater population experiences the various gains that come with rising property values. This is not only a local, but a national interest, as well.

Expanding the definition of public purpose to include the interests of low-income community members promotes the establishment stable communities among mixed income constituents, accomplishing a fundamental incentive of redevelopment.